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IN THE SUPREME COURT OF THE UNITED STATES

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FLORENCIO ROSALES-MIRELES,)
 Petitioner,)
 v.) No. 16-9493
 UNITED STATES,)
 Respondent.)

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Washington, D.C.

Wednesday, February 21, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES:

KRISTIN L. DAVIDSON, ESQ., Assistant Federal Public Defender, San Antonio, Texas; on behalf of the Petitioner.

JONATHAN ELLIS, ESQ. Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-9493,
5 Rosales-Mireles versus the United States.

6 Ms. Davidson.

7 ORAL ARGUMENT OF KRISTIN L. DAVIDSON

8 ON BEHALF OF THE PETITIONER

9 MS. DAVIDSON: Mr. Chief Justice, and
10 may it please the Court:

11 The government concedes that the Fifth
12 Circuit's shocks-the-conscience standard is the
13 wrong approach for a court of appeals to apply
14 under the fourth prong of plain error review.
15 The question remains: How should a court of
16 appeals exercise its discretion when confronted
17 with an obvious guidelines error that probably
18 results in a defendant serving a longer prison
19 sentence?

20 We ask the Court to recognize what
21 every circuit but the Fifth already has; that
22 is, in the ordinary case, such an error
23 seriously affects the fairness, integrity, and
24 public reputation of the judicial proceedings
25 and warrants correction.

1 CHIEF JUSTICE ROBERTS: One -- one
2 day? I mean, if your -- if the person is in
3 prison one extra day, that would cause people
4 to look at judicial proceedings as lacking
5 fairness and integrity?

6 MS. DAVIDSON: I believe so under the
7 -- under the analysis of the fourth prong.
8 Certainly, a sentence of an extra 20 years,
9 versus a day, 20 years is worse, but, under the
10 analysis of the fourth prong, the question
11 really is, does the nature of the error
12 frustrate the purposes served by the rule at
13 issue?

14 And in the context of the guidelines,
15 a guidelines error directly frustrates the very
16 purposes served by the sentencing guidelines
17 scheme: the congressional goals to promote
18 uniformity and proportionality and to avoid
19 unwarranted disparity; to achieve parsimony,
20 meaning that a defendant is sentenced to the
21 least amount of time necessary to effectuate
22 the statutory goals; and to have respect for
23 the district court --

24 CHIEF JUSTICE ROBERTS: No, and these
25 are all reasons that you would consider when

1 the question is -- when there's an objection
2 and the question is raised. Here, we're
3 dealing with a situation when there was no
4 objection, so we're in the context of plain
5 error. So it seems to me that you have to
6 argue more than just this was wrong and it
7 ought to be fixed.

8 MS. DAVIDSON: Agreed. This Court has
9 always said something more is required, but at
10 this point, a defendant has met his burden to
11 show a plain error that affects substantial
12 rights.

13 JUSTICE GINSBURG: We have said many
14 times that correction under the plain error
15 doctrine should be exercised sparingly, but I
16 take it your argument is, in the context of a
17 guidelines error, the discretion should not be
18 exercised sparingly; it should be exercised
19 routinely.

20 MS. DAVIDSON: Well, Your Honor, I
21 think the context is that 52(b) applies to the
22 grand universe of errors. And so guideline
23 errors remain a narrow type of error that can
24 arise. And statistically speaking, in the last
25 fiscal year, of the thousands of sentencing

1 appeals that were raised, less than 6 percent
2 got remanded because they raise a guideline
3 calculation error.

4 So we have the empirical evidence,
5 which is cited on page 12 of the yellow reply
6 brief, that, in fact, it doesn't happen very
7 often.

8 JUSTICE KAGAN: Why are guideline
9 error --

10 JUSTICE GINSBURG: But then you are
11 saying -- you are saying that guidelines errors
12 are -- are exceptions to the general rule that
13 plain error review should yield corrections
14 sparingly? You are saying that this is a
15 category where it should be exercised
16 routinely?

17 MS. DAVIDSON: I think a guideline
18 error presents a -- the nature of the guideline
19 error is such that it ordinarily will have that
20 effect, but it won't always.

21 JUSTICE KAGAN: And -- and why is
22 that? Why are guideline errors a category in
23 which we should kind of flip what usually
24 happens; it goes from sparingly to most of the
25 time?

1 MS. DAVIDSON: As the Court has
2 recognized in Peugh and Molina-Martinez, the
3 sentencing guidelines provide the essential
4 framework for federal sentencing, and there is
5 a well-documented anchoring effect so that when
6 there is an erroneously high guidelines range,
7 there's a significant risk that the defendant
8 was sentenced to a longer prison time than he
9 otherwise would have had the district court not
10 been influenced by the error itself.

11 JUSTICE KAGAN: That seems more a
12 prong 3 question, isn't it? The question --
13 you know, that -- that most guideline
14 calculation errors are going to have an effect
15 on the -- on -- on -- on the sentence, but then
16 there's also prong 4. Why shouldn't that do
17 something different?

18 MS. DAVIDSON: It's our position that
19 prong 3 and prong 4 do have distinct inquiries,
20 but because there's such a direct nexus between
21 the sentencing guideline error and the effect,
22 the separate inquiries will also -- will often
23 be examining the same or similar type of
24 information on the record before it.

25 And while it is true that

1 Molina-Martinez looks at the anchoring effect
2 of the guideline to show that the guideline
3 error itself can be evidence of an effect on
4 substantial rights, the resulting harm of that
5 is a longer prison sentence. And an excess
6 amount of prison is a serious harm that run --
7 that has consequences both for society and the
8 administration of justice.

9 JUSTICE ALITO: I mean, if we said
10 that an error is plain if it creates a risk
11 that the defendant will serve a longer sentence
12 than the defendant would have otherwise served,
13 I don't know what's left of the plain error
14 rule in criminal cases.

15 You -- you seem to be equating -- you
16 seem to -- your argument seems to be that an
17 error is plain unless it's harmless, unless it
18 is not harmless, isn't that right?

19 MS. DAVIDSON: No. And there's
20 actually quite a lot left of the plain error
21 analysis.

22 JUSTICE ALITO: Well, what is left of
23 it in this context? I mean, you cite three
24 examples in your brief. One is when the
25 defendant has waived an objection to the

1 guideline -- to the sentence in -- in a plea
2 agreement. The other is when the defendant has
3 already completed the sentence, in which case I
4 think the case would be -- would be moot.
5 There would be no opportunity to get relief in
6 a direct appeal. And the other is when the --
7 the defendant is serving a concurrently running
8 sentence.

9 Do you have others?

10 MS. DAVIDSON: Yes. We -- we cite the
11 Tyson case on page 8 in the yellow brief, and
12 that's a -- a good example of where we have two
13 different inquiries that are informed by the
14 same sort of information, the effect of the
15 guideline.

16 In that case, the court of appeals
17 assumed that the third prong was met but denied
18 relief under the fourth prong because it found
19 that the ultimate purposes of sentence were not
20 frustrated by the guideline error because the
21 guideline error didn't serve the basis for the
22 sentence in the first place.

23 JUSTICE ALITO: Okay. So, if there's
24 any chance that the guideline error affected
25 the sentence, then the error is plain? That's

1 your argument?

2 MS. DAVIDSON: Well, yes, it would
3 rise to a level of seriousness to warrant
4 correction.

5 JUSTICE ALITO: Okay. Now, if we were
6 to apply that in other contexts, what would be
7 left of the plain error rule in criminal cases?

8 MS. DAVIDSON: Well, every error is
9 different. And a factor for a court of appeals
10 to consider under the fourth prong is the
11 nature of the error.

12 And I think that can be broken down
13 into two factors: First, for the court to look
14 at what purposes are served by the rule in
15 question, and then to examine the record to see
16 if it demonstrates that those purposes are
17 actually frustrated by the error.

18 So I think that's a type of inquiry
19 that's at least implicit in Cotton and Johnson.
20 In cases like that, errors like that would
21 certainly --

22 JUSTICE ALITO: Okay. Error --
23 evidence is erroneously admitted at trial.
24 It's hear -- it's hearsay and it's -- it's
25 inadmissible hearsay. It's admitted. So

1 there's an error. But the reviewing court says
2 that the -- the harmless error standard for
3 non-constitutional errors is met. But there is
4 a chance that it had an effect on the -- on
5 conviction.

6 So why wouldn't that be a plain error?

7 MS. DAVIDSON: Well, it likely could
8 be a plain -- I mean, no, it -- it -- the --
9 let me back up.

10 The evidentiary standard that has to
11 be met under the third prong of the plain error
12 is a -- is a low evidentiary standard: A
13 reasonable probability. That's less than
14 preponderance of the evidence.

15 So it's entirely possible that a court
16 could look at the record and see that the third
17 prong was met but then, looking at the record
18 in total, find overwhelming and essentially
19 uncontroverted evidence that the outcome was
20 right, notwithstanding the error.

21 JUSTICE ALITO: But you're changing
22 the standard. You're changing the harmless
23 error standard when you say that, aren't you?

24 MS. DAVIDSON: Harmless -- excuse me.
25 Are we talking about harmless error standard or

1 the plain error standard?

2 JUSTICE ALITO: Well, my inquiry is
3 what is the difference between the plain error
4 rule and the harmless error rule as you
5 understand them? And you just told me, as I --
6 what I think you just told me was that the
7 court would have to say it's uncontroverted,
8 that this had no effect, otherwise it would be
9 plain error?

10 MS. DAVIDSON: If I understand the
11 question correctly as distinguishing between
12 harmless error and plain error, the -- one of
13 the primary differences is that the burden
14 remains on the defendant the entire time during
15 the plain error analysis.

16 The burden never shifts like it does
17 under a harmless error standard.

18 JUSTICE ALITO: Yeah, well, that ought
19 to cut in the opposite direction, shouldn't it?

20 MS. DAVIDSON: I'm not sure I
21 understand the question.

22 JUSTICE ALITO: The defendant has the
23 burden under plain error, right, so it should
24 be harder there. I -- I still don't -- I just
25 don't understand what is left of the plain

1 error rule. There doesn't seem to be very much
2 left, if the only question is, is there any
3 chance that it caused the defendant to serve a
4 longer sentence than the defendant would have
5 otherwise served?

6 MS. DAVIDSON: I think the approach
7 that's applied by the majority of circuits
8 actually gives vitality to the plain error
9 standard, as the court expressed it in Olano.
10 And it turns on the seriousness of the error.

11 So it's going to be contextualized by
12 the error and its effect on --

13 JUSTICE GINSBURG: I thought you had
14 just said that the guidelines miscalculation is
15 an exception to the normal way that plain error
16 operates. You have agreed with me that in
17 guidelines miscalculations, the error should be
18 corrected routinely, not sparingly. I thought
19 you were cordoning off guidelines
20 miscalculations from all other errors.

21 MS. DAVIDSON: No. Let me clarify.

22 The majority approach that circuits
23 apply don't change the formula that is in place
24 under the plain error standard. It still
25 remains that the defendant prove all four

1 prongs.

2 What is different about a guidelines
3 error is the nature of that error. There's a
4 particularly close nexus between the error and
5 the outcome and how that outcome frustrates the
6 purposes served by the sentencing guidelines
7 scheme.

8 JUSTICE KENNEDY: Well, then your
9 answer to Justice Ginsburg should be yes, and
10 it should have been yes at the outset. You
11 said sentencing is different.

12 We have separate rules for sentencing,
13 in part because the costs of remand are much
14 less than the cost of a new trial, there can be
15 some complexities, and it seems to me that you
16 just have to confront the consequences of that
17 choice to say that, in the sentencing case, an
18 ordinary error is very close to plain error,
19 but you seem to resist that.

20 MS. DAVIDSON: No, I -- let me
21 clarify. I think that's the correct
22 formulation, Justice Kennedy.

23 JUSTICE ALITO: Well, if that's the
24 correct formulation, then why -- why is a
25 sentencing guidelines error more serious than

1 any other type of error, more serious than a
2 constitutional error, more serious than a
3 violation of a statutory command?

4 Here, we're not even talking about
5 something that's mandatory. These guidelines
6 exist in some kind of middle universe that I
7 don't understand, but that's another -- that's
8 another question.

9 Why -- why is this different?

10 MS. DAVIDSON: Well, the analysis
11 doesn't turn on whether or not it's a
12 constitutional or non-constitutional error or
13 that the sentencing guidelines are mandatory
14 versus advisory.

15 It's looking at how close of a nexus
16 exists between the error and how it affects the
17 outcome. And because the sentencing guidelines
18 are the starting point for every sentence and
19 are in the real basis the -- what a sentence
20 becomes anchored to, we have empirical data
21 which reflects their anchoring effect, that
22 when there's an erroneously high guideline
23 range, there's a serious risk that -- a
24 significant risk that the defendant's sentence
25 was also higher than it would have been had the

1 district court not been improperly influenced
2 by it.

3 CHIEF JUSTICE ROBERTS: I -- I think
4 the basis for your -- or perhaps the basis for
5 your exception is that the error is so precise,
6 you know, a typographical error has caused the
7 person to stay in jail for -- to have to stay
8 in jail for another six months. A
9 typographical error and exactly six months.

10 So I think one of the considerations
11 we take into account is the reputation for the
12 judicial system, justice system. And if you
13 tell somebody, well, because of a typo, the guy
14 is going to stay in jail for six more months,
15 people will say, well, that's not -- that's not
16 fair.

17 On the other hand, I don't think that
18 takes into account there is cost associated
19 with that, which is the -- the remedy is you
20 send it back for another sentencing hearing,
21 who knows how long, how much time has passed.
22 The judge has to reconstruct the whole
23 operation. And that's caused by your client's
24 failure to object when he should have objected.

25 So why doesn't it make sense to say

1 that it kind of makes a difference, if you're
2 talking about a relatively insignificant amount
3 of time -- any day in jail is not
4 insignificant -- but there's a difference
5 between an error that results in an additional
6 six months and an error that results in an
7 additional five years.

8 Is that something that the court can
9 consider or is it -- I guess it's the first
10 question I asked. Is your position one day and
11 it's plain error?

12 MS. DAVIDSON: I don't think the
13 amount of excess is the -- is the right marker
14 for a court of appeals to determine because it
15 would run contrary to the congressional goal of
16 parsimony.

17 And as the Court stated in Williams,
18 it's the district court's prerogative to
19 determine the appropriateness of a particular
20 sentence to begin with.

21 As to relative cost, certainly,
22 there's always some cost involved to
23 resentencing. But the fact is it is a lower
24 cost than having a new trial, for example.

25 The Court recognized that resentencing

1 doesn't present the same amount of costs in
2 Molina-Martinez. And --

3 JUSTICE SOTOMAYOR: Mrs. Davidson --
4 Ms. Davidson, I think of the three prongs, the
5 third and the fourth prong, the third prong as
6 being fairness of process: Were you given the
7 process that you were entitled to
8 constitutionally or statutorily?

9 And so, on the third prong, we've had
10 many cases where elements were not given to a
11 jury. This is neither case. We've had Cotton,
12 where a drug amount wasn't given to a jury. We
13 look at that third prong as a substantial
14 deprivation of some form of constitutional or
15 state right.

16 I think of the fourth prong as
17 fairness of the ultimate outcome, which is very
18 different because often, like in Cotton, where
19 an element like drug amount wasn't given to a
20 jury, we look at the quantum of evidence and
21 say: Would the outcome have been different?
22 And that's most of our cases. Was the area --
23 error so substantial that the outcome was
24 actually unfair?

25 And so, for me, that fourth prong does

1 serve even in sentencing guidelines a different
2 function. It talks -- our third-prong finding
3 is that the fairness of a judge, just process
4 of considering your sentence from a correct
5 guideline, was frustrated. The third -- fourth
6 prong goes to, is there a substantial
7 possibility that the outcome was affected, that
8 you would have received a lesser sentence?

9 Is there an error in the way I'm
10 looking at this?

11 MS. DAVIDSON: No, I don't believe so.
12 And in Cotton, it's not just what the court
13 examined of what the outcome would have been
14 but -- but based on what that record
15 demonstrated.

16 And I think that analysis would apply
17 in this case because we don't have a record
18 that demonstrates what a district court would
19 have done by overwhelming and uncontroverted
20 evidence, especially when it's not just a
21 mathematical error of the guideline, but it's
22 premised on a factual error in the criminal
23 history.

24 JUSTICE SOTOMAYOR: Well, I think your
25 -- your point in your brief was he got, at the

1 low end of the guidelines, 78 months, despite
2 all of the negative factors that the government
3 points to in its brief, his serious criminal
4 history, et cetera, et cetera.

5 The judge still sentenced him at the
6 low end of the guideline. And so that
7 demonstrates that it is possible, not just
8 substantially possible, but that the judge will
9 in fairness and upholding the integrity of the
10 judiciary give him a lesser sentence, correct?

11 MS. DAVIDSON: Yes.

12 JUSTICE SOTOMAYOR: It's a
13 possibility -- a strong possibility?

14 MS. DAVIDSON: Yes.

15 JUSTICE GORSUCH: Ms. Davidson, I was
16 wondering about our -- our standard in Olano
17 and the fourth prong, talking about fairness,
18 reputation, integrity of judicial proceedings,
19 where it came from.

20 And I traced it back to Atkinson, a
21 1936 opinion. I know you've cited that. And I
22 wanted your thoughts about that, because in
23 Atkinson, it said district courts should be
24 guided by the following test in when to
25 exercise their discretion to correct a plain

1 error and suggested that they should correct a
2 plain error whenever it's obvious or when it
3 affects the fairness, integrity, or public
4 reputation of judicial proceedings.

5 And Olano turned that "or" into an
6 "and." What do we make of that?

7 MS. DAVIDSON: Well, I'm aware of that
8 history, but I also can't ignore how often
9 cited the Court has restated Olano's
10 formulation, so I don't have a position in --
11 in going back to a pure disjunctive, but I
12 would like to point out that in articulating
13 that -- what became the fourth prong standard
14 in Atkinson, Atkinson cites Brasfield, and in
15 Brasfield, it's an example where the Court
16 recognized a type of error that, by virtue of
17 inquiring into the numerical division among the
18 jurors, that inquiry itself impugned the
19 system.

20 And so I think there is recognition
21 that different errors have a different degree
22 of seriousness and have a different level of
23 effect compared to --

24 JUSTICE GORSUCH: Well, if that's true
25 on the fourth prong, public reputation, let's

1 say, how are we supposed to determine that
2 normatively, right? As an empirical matter.
3 We're supposed to take a poll? I think if we
4 took a poll, we'd find that a lot of people may
5 not care about how long your client spends in
6 prison. Right? Whether it's an extra six
7 months or not.

8 Should that matter? Should public
9 reputation in a -- in a -- in a institution
10 that's designed to check majoritarian impulses
11 like the judiciary is supposed to, should --
12 should those majoritarian influences even
13 matter in our consideration of the fourth
14 prong?

15 MS. DAVIDSON: Well, I think it's
16 difficult because there's not going to be that
17 type of evidence on a record of what the public
18 thinks. But I think the formulation of the
19 fourth prong, public reputation of the judicial
20 proceedings, is -- is less of an -- it's not
21 public reputation of the defendant. It's of
22 the judicial proceedings.

23 And so I do think that --

24 JUSTICE GORSUCH: So it's a normative
25 inquiry rather than an empirical one, I think

1 is what you're suggesting, in which case,
2 should -- should the fact that a person spends
3 a day in prison longer than the law permits be
4 something we should care about?

5 MS. DAVIDSON: Yes, especially when it
6 results from an obvious and easily correctable
7 error.

8 JUSTICE GORSUCH: That we've made
9 ourselves?

10 MS. DAVIDSON: Correct.

11 If there are no further questions, I'd
12 like to reserve my time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Ellis.

16 ORAL ARGUMENT OF JONATHAN ELLIS

17 ON BEHALF OF THE RESPONDENT

18 MR. ELLIS: Mr. Chief Justice, and may
19 it please the Court:

20 The plain error rule is designed to
21 capture a narrow set of errors that we as a
22 society are not willing to subject to the
23 ordinary rules of party presentation and
24 forfeiture that govern federal proceedings.

25 The question here is whether clear

1 guidelines errors -- errors as a class will
2 almost always meet that test. We think the
3 answer is no, and the Petitioner's argument to
4 the contrary ignores fundamental aspects of the
5 federal sentencing regime as inconsistent with
6 the federal rules and this Court's precedent.

7 JUSTICE GINSBURG: Isn't it so that
8 most circuits, if not all, that have addressed
9 the question do take the position that
10 guidelines miscalculations, if they're clear,
11 call for correction on plain error review?

12 MR. ELLIS: So I think Petitioner
13 overstates the consensus in the lower courts.
14 Only two court of appeals have adopted --

15 JUSTICE GINSBURG: Did the Ten -- did
16 the Tenth Circuit?

17 MR. ELLIS: I'm sorry?

18 JUSTICE GINSBURG: Did the Tenth
19 Circuit in, what is it, Sabillon-Umana
20 overstate it when the Tenth Circuit said that
21 the third and fourth prongs of the plain error
22 test align in these guidelines miscalculations?

23 MR. ELLIS: So I think -- I think what
24 the Tenth Circuit said is that courts of
25 appeals often exercise authority -- their

1 authority under the fourth prong when the first
2 three are met and that some have adopted a
3 presumption. That's correct.

4 Two courts of appeals have adopted
5 presumptions, but even those courts have
6 recognized that that presumption may be
7 rebutted in case -- based on the factors that
8 we have identified in our brief as grounds not
9 to exercise the court of appeals' authority.

10 And, in fact, the Third Circuit, one
11 of those two circuits, since Molina-Martinez,
12 has announced -- has made clear that the fourth
13 prong should be applied on a case-specific
14 basis and that it -- even in a case where the
15 first three prongs are met, even in a
16 guidelines case where the first three prongs
17 are met, it imposes a considerable barrier to
18 relief.

19 JUSTICE KAGAN: Mr. Ellis, can -- can
20 I just -- Justice Gorsuch, when he was a judge,
21 wrote this opinion which I'm sure you've read
22 many times, and I just want to quote one
23 sentence from it and then ask you what you
24 think about it because he basically, you know,
25 suggests why you maybe lose.

1 (Laughter.)

2 JUSTICE KAGAN: But this is what he
3 says. He might not agree with this anymore,
4 who knows, but --

5 (Laughter.)

6 JUSTICE KAGAN: -- he says, "What
7 reasonable citizen wouldn't bear a rightly
8 diminished view of the judicial process and its
9 integrity if courts refuse to correct obvious
10 errors of their own devise that threaten to
11 require individuals to linger longer in federal
12 prison than the law demands, especially when
13 the cost of correction is so small?"

14 And I take that to be combining three
15 things. First, you have a deprivation of
16 liberty. Second, you have a -- an error, as he
17 says, of your own devise; in other words, the
18 court has something to do with it. The -- the
19 probation officer has messed up, and then the
20 court hasn't caught the error. And -- and,
21 third, that the cost of correction is small,
22 certainly relatively smaller.

23 And you package those three things
24 together and you get a -- you know, a rule that
25 treats these kinds of errors differently, that

1 does mean that they're routinely, as opposed to
2 sparingly, corrected.

3 MR. ELLIS: Sure.

4 JUSTICE KAGAN: Why isn't that right?

5 MR. ELLIS: There's a lot packed into
6 that. So I think just sort of starting with
7 sort of the man on the street and what -- the
8 view of the judiciary, I think if you went on
9 to explain that -- that ours is a system of
10 party presentation that's been designed so that
11 the -- the parties have an opportunity to raise
12 errors and they are -- they're expected to do
13 so, that any complicated system like a system
14 of justice has to have rules and those rules
15 have to have meaning. But I think it's -- I
16 don't know that they would conclude or look
17 less upon the judiciary if -- in a -- in an
18 ordinary --

19 JUSTICE GORSUCH: Isn't it --

20 JUSTICE KAGAN: Well, I think what
21 they're --

22 JUSTICE GORSUCH: No, I'm sorry. No,
23 please.

24 (Laughter.)

25 JUSTICE KAGAN: I mean, he could

1 probably do it better than I can.

2 JUSTICE GORSUCH: You're doing a much
3 better job than I.

4 (Laughter.)

5 JUSTICE KAGAN: I think what this is
6 saying is, yes, the reasonable citizen,
7 assuming this great reasonable citizen exists,
8 you know, would think all of those things, but
9 he would say here is this particular kind of
10 error, and -- and it's rare that all of these
11 three things come together.

12 Deprivation of liberties, that's
13 pretty common. But low costs, that's not so
14 common. And the fact that the error is of the
15 court's own making, that's really uncommon.

16 And you put all those three things
17 together, there's just one result that's
18 screaming out at you.

19 MR. ELLIS: So -- so you're -- you're
20 exactly right that the deprivation of liberty
21 is not so uncommon. And this is the rule of
22 criminal procedure. So anytime that this rule
23 comes into play, deprivation of liberty is at
24 stake. So then we're talking about the costs.

25 And we think the cost might come in in

1 two different ways. One way might be in
2 setting the standard as for when you might
3 apply plain error, but we think the Court did
4 that in Olano, that it was correct.

5 That standard was ratified in the 2002
6 amendments to the Federal Rules, indeed where
7 it conformed to Olano, and that this Court
8 has -- doesn't have the authority to change
9 that standard outside of the Rules Enabling Act
10 and the procedures identified there.

11 And then you move on to whether the
12 court was one of the court's own making, and I
13 just don't think that's quite right. The
14 probation office is, of course, a part of the
15 court, but the responsibility for raising
16 errors, it still lies with the defendant.

17 And the defendant has ample
18 opportunity in most cases and, indeed, in this
19 case, to review the PSR and bring to the
20 court's attention any errors.

21 And error in this case was one, and in
22 many cases will be one, in which the defendant
23 is uniquely competent to identify and bring to
24 the court's attention.

25 So you put all that together and you

1 -- I don't think it follows.

2 JUSTICE GINSBURG: Would it -- would
3 it -- would it be ineffective assistance of
4 counsel for counsel not to notice a glaring
5 error in calculating the guidelines?

6 MR. ELLIS: I think there are some --
7 there may be some cases perhaps. We don't
8 think that there's been any claim in this case.
9 We don't think every failure to spot an obvious
10 error in the -- in the PSR would amount to
11 deficient performance or -- or necessarily
12 amount to prejudice under this -- under
13 Strickland.

14 And we think this case is about the
15 category of errors that don't amount to -- to
16 ineffective assistance of counsel and what the
17 court -- the court of appeals should do when
18 they're raised for the first time on appeal.

19 JUSTICE KENNEDY: I still am not sure,
20 when I -- when I leave here and write down what
21 your position is, what is your definition of
22 the fourth prong as it applies to this case?

23 MR. ELLIS: Sure. So our definition
24 is -- is what the -- is the Court's definition.
25 Unfortunately, this is a -- not an area much

1 like sentencing itself that lends itself to
2 bright-line rules.

3 JUSTICE KENNEDY: What is your -- what
4 is your best guidance as to how to apply it in
5 this case using neutral principles?

6 MR. ELLIS: So I --

7 JUSTICE KENNEDY: General principles.

8 MR. ELLIS: Yeah, sure. So I think
9 the test is the one from Olano, whether the
10 error is one that seriously affects the
11 fairness and integrity --

12 JUSTICE KENNEDY: Yes.

13 MR. ELLIS: -- of the judicial
14 proceedings.

15 I think the nature of the guideline --
16 of the error here should inform that analysis.
17 The Petitioner has argued that we deny that
18 it's relevant, but that's not true.

19 We don't think it's grounds to create
20 an exception to the rule. And we don't think
21 it's grounds to change that standard, but we do
22 think it's highly relevant to how it would
23 apply.

24 JUSTICE KENNEDY: So what -- I'm --
25 I'm waiting to write something down.

1 MR. ELLIS: Sure.

2 (Laughter.)

3 MR. ELLIS: We think that in -- in a
4 guidelines case, in the ordinary guidelines
5 case, where -- where the sentence that was
6 imposed is one that is lawful and one that is
7 -- that would be reasonable even if the guide
8 -- error had been brought to the attention of
9 the court and -- and corrected, it's going to
10 be an unlikely case, an unusual case, where
11 that is the type of error that seriously
12 affects the fairness, integrity, and public
13 reputation of judicial proceedings.

14 JUSTICE BREYER: Why?

15 CHIEF JUSTICE ROBERTS: But there may
16 be -- there may be a case where it does, right?
17 I mean, we're talking about whatever the length
18 of time is here.

19 But let's say the guideline says you
20 should get somewhere between 2 and 5 and, in
21 fact -- between 8 and 10, and, in fact, the
22 right guideline was 2 and 5.

23 Would that be a situation where you
24 say the balance worked out so that it would be
25 plain error?

1 MR. ELLIS: I think it's hard to give
2 a concrete answer based on, you know, facts
3 like that. We do think that it is a much more
4 often -- more often will be met in cases where
5 the sentence doesn't fall within the correct
6 range. And we do think, as you noted before,
7 that the magnitude of the error is -- is
8 relevant to the analysis.

9 We also think that what's relevant is
10 that the court could have, even if you couldn't
11 say would have, departed from the -- the range
12 that it's calculated up to the range that was
13 the correct one.

14 JUSTICE BREYER: All right. So is
15 that -- is that -- because I have -- I'm
16 drawing on what the Chief Justice said now and
17 before in my mind. And the question in my mind
18 is, should we proceed by category?

19 And people have been focusing, which I
20 agree with, about the -- what Justice Kagan
21 said in drawing on what was written by Justice
22 Gorsuch, what people would think of this, but
23 I'm not thinking of what people would think of
24 this. I'm thinking of what the guidelines are
25 about.

1 And we have, one, there was an error.
2 Two, it's clear and obvious. Three, it did
3 affect the party's rights. He went to jail at
4 least one day more. Okay? So we got those
5 three things.

6 And given those three things, it's
7 probably an arithmetical error, probably, but
8 not definitely. And then we ask for did the
9 error affect -- now there are three things here
10 -- fairness, and the second one is what I focus
11 on, I'm not focusing on fairness, I'm not
12 focusing on public reputation of judicial
13 proceedings, I am focusing on the integrity of
14 the judicial proceeding.

15 And the reason I'm focusing on it is
16 because the guidelines have a special purpose
17 and they have a special procedure. The special
18 purpose is to create a kind of uniformity among
19 people who do the same thing in respect to
20 their punishment.

21 And the special procedure is that the
22 Commission and the courts cooperate in
23 gathering statistical information so that the
24 Commission can see how that's working.

25 Now, as soon as you have people who

1 depart for incorrect reasons from what they're
2 supposed to put, you muck up that statistical
3 information.

4 And although you could say with just
5 one or two it doesn't matter, there is no way
6 to distinguish between one or two and 51 or 52,
7 and maybe one across the country but maybe one
8 in a single district does matter.

9 And so all those kinds of technical
10 mistakes that do affect the party, that are
11 clear, do interfere significantly with the
12 Congressionally legislated purpose of the
13 guidelines and the effort to implement them.

14 Therefore, considered as a class,
15 because of the difficulty of distinguishing
16 among them, we don't want to go case by case,
17 distinguishing as a class, where 1, 2, and 3
18 are met, so is 4. To the least, there is a
19 presumption to that effect.

20 All right. That's how I would look at
21 it. And what's the answer to that?

22 MR. ELLIS: So a couple responses to
23 that, Justice Breyer. Number 1, in Pepper,
24 this Court recognized that the sort of
25 disparity that Congress is -- was worried about

1 in the guidelines context is not the sort of
2 disparity that's caused by the ordinary rules
3 of appellate procedure.

4 And so we don't think there's any
5 indication here that the kind of disparity that
6 the Congress was -- was concerned about is the
7 type that -- that flows from the ordinary
8 application of the plain error rule.

9 As for the nature of the -- of the
10 guidelines and how they work, we actually think
11 that cuts the other way. As I say, we do think
12 it's relevant. But the difference in a
13 sentencing case is that, unlike in a trial, the
14 outcome isn't binary.

15 So, when you're talking about an error
16 that meets the first three prongs, you're not
17 talking about an error that creates a
18 reasonable probability of a -- of a different
19 outcome in the trial, that is, a conviction or
20 acquittal.

21 You're talking about an error that
22 creates a reasonable probability of some
23 movement in the sentence.

24 But a defendant in the federal system
25 isn't entitled in most cases to one particular

1 sentence after a duly -- duly being -- been
2 duly convicted. Rather, they're entitled to
3 one of a range of lawful sentences.

4 And the sentencing commission has
5 established a framework in which there is, for
6 any given defendant with a given criminal
7 history and a given offense conduct, there is
8 actually a range of reasonable sentences within
9 that lawful one.

10 And so, when you're talking about an
11 error that may have created reasonable
12 probability of moving within that range, but
13 the sentence that was imposed still falls
14 within the right range.

15 JUSTICE BREYER: Correct. But if you
16 will read, as I hope you would someday, the
17 introduction to the initial version of the
18 guidelines, which happens still to be there,
19 you will see that the purpose of the Commission
20 is first to create a set of guidelines and
21 then, through the procedures I'm talking about,
22 to see what judges actually do in administering
23 the guidelines so that those can be improved
24 and changed over time.

25 Now, if we are looking at not what the

1 judge did under the guideline but what the
2 judge thinks he did under the guideline, but he
3 got the guideline all wrong, then, all right,
4 we can't do it, we can't carry that out.

5 MR. ELLIS: So --

6 JUSTICE BREYER: As I say, we might be
7 able to live with one mistake in one district,
8 but then we have to distinguish which ones, and
9 there's no way to do that.

10 So you might end up with 50 -- the
11 same point I'm making before.

12 MR. ELLIS: Sure.

13 JUSTICE BREYER: So I'm saying what
14 the integrity is that is interfered with is the
15 integrity of the Congressionally-mandated
16 purpose and method through which the guidelines
17 are to be implemented.

18 MR. ELLIS: So I don't think there's a
19 record for -- to conclude that the -- that the
20 ordinary application of the plain error rule is
21 going to so muck up the system as you say. And
22 if there were, I think that would be maybe
23 perhaps grounds for there -- for someone to
24 consider a change to the standard.

25 JUSTICE GORSUCH: Well, Mr. Ellis, if

1 -- along those lines, though, Congress did
2 speak to this question, the feedback loop
3 problem that Justice Breyer has been alluding
4 to, in 3742(f)(1), where it said if there's an
5 error in calculating the sentencing guideline,
6 the case shall be remanded.

7 JUSTICE BREYER: Yeah, that's true.

8 JUSTICE GORSUCH: Not -- not "may." I
9 take it you'd have us read "shall" to mean
10 "may."

11 MR. ELLIS: So I think that -- that
12 provision, 3742(f)(1), was written to -- to
13 deal with preserved errors in a mandatory
14 system.

15 JUSTICE GORSUCH: So -- well, you
16 haven't -- you haven't suggested that the
17 statute's ineffectual, have you?

18 MR. ELLIS: I'm sorry?

19 JUSTICE GORSUCH: You'd have us just
20 ignore the statute then?

21 MR. ELLIS: So I think there's
22 actually a debate.

23 JUSTICE GORSUCH: I think those are
24 your choices.

25 MR. ELLIS: But now --

1 JUSTICE GORSUCH: We either ignore the
2 statute or we read "shall" to mean "may."

3 MR. ELLIS: I -- I guess,
4 respectfully, I --

5 JUSTICE GORSUCH: Have you got a third
6 option?

7 MR. ELLIS: -- I -- I think there is.

8 JUSTICE GORSUCH: Okay.

9 MR. ELLIS: Number one, I think in --

10 JUSTICE GORSUCH: So what's the third
11 option?

12 MR. ELLIS: So the third option is to
13 read that to discuss -- to -- to refer to
14 preserved errors and to incorporate the
15 established rules. That's what the Court said
16 in Williams, that that -- that that "may" still
17 is subject to the harmless error rule. We see
18 no reason why it wouldn't be subject to the
19 plain error rule.

20 JUSTICE ALITO: Well, that "shall" is
21 part of the mandatory regime. I thought that
22 was declared unconstitutional in Booker.

23 MR. ELLIS: So that's the first option
24 that he gave me, and I think that's still open
25 to the Court. In -- in Footnote 7 of Greenlaw,

1 this Court specifically flagged that the
2 discussion there is not meant to settle the
3 question as to whether 3742(f)(1) --

4 JUSTICE ALITO: I mean, suppose a
5 district judge said, all right, you know,
6 there's a dispute about which -- what the
7 guidelines range is, and one of the guidelines
8 that's possible here has a range that includes
9 the sentence of 60 months, and I have
10 considered the statutory factors that I am
11 supposed to consider in identifying a just and
12 appropriate sentence and I think 60 months hits
13 it right on the -- the head, and that's the
14 sentence that I'm going to impose and I would
15 impose that sentence no matter what the
16 guidelines said.

17 Would there be a problem there?

18 MR. ELLIS: There would not. That
19 would not -- I think that would not meet the
20 third prong of plain error. I'd say that's not
21 so far off from what happened here. So the --
22 I think we've talked about the factors in our
23 brief.

24 JUSTICE ALITO: But that would be --
25 if -- if "shall" is taken literally, there

1 would still -- that would -- that would still
2 be subject to reversal, wouldn't it?

3 MR. ELLIS: I think that's right. I
4 think the Court dealt with that in Williams
5 when it said that the -- the "shall" still is
6 subject to the harmless error rule, and I think
7 in that case it certainly would be harmless.

8 It may be worth going through why we
9 think this particular error is not one that
10 seriously affects the fairness and integrity.
11 So we've numbered out -- laid out a number of
12 factors in our brief from pages 36 to 39, but
13 we think maybe three are the most important
14 here. And the first is that --

15 JUSTICE GORSUCH: Before you -- before
16 we leave that, I'd just like to nail this down
17 --

18 MR. ELLIS: Sure.

19 JUSTICE GORSUCH: -- because the
20 harmless error rule makes sense to me in
21 Williams in light -- in light of the language
22 because the court has to determine the sentence
23 was imposed as a result of an incorrect
24 application of the sentencing guideline, and if
25 it's harmless, it wasn't imposed as a result

1 of.

2 But how do you -- how do you get plain
3 error into this rule? How do you get, you
4 know, that problem solved?

5 MR. ELLIS: Sure.

6 JUSTICE GORSUCH: Without turning
7 "shall" into "may" or ignoring the statute all
8 together?

9 MR. ELLIS: As -- I think you -- you
10 -- you get it by -- by recognizing that that
11 provision was passed in the backdrop of plain
12 error, that it was talking about preserved
13 errors, and that there's no reason to think
14 that the Congress meant to overturn it there.
15 And you get it by saying that -- by recognizing
16 that that provision was enacted as part of the
17 mandatory guideline system, that what it was
18 doing was implementing 3742(e), which this
19 Court said was unconstitutional in Booker and
20 therefore struck it.

21 And so I think there's a decent -- a
22 very good argument that, in fact, with it goes
23 the -- the subsequent provision that says when
24 you violate a provision, an unconstitutional
25 provision in 3742(e), here's what you do.

1 And so, in this case, as I say, there
2 are three principal reasons why we think the
3 error does not seriously affect the fairness,
4 integrity, or public reputation of judicial
5 proceedings.

6 Number 1, the sentence that was
7 imposed fell within the corrected range. So we
8 know from that that in the Sentencing
9 Commission's expert judgment, this is a
10 reasonable sentence for a defendant with
11 Petitioner's criminal history and offense
12 conduct, for a typical defendant in that
13 position.

14 Number 2, the district court imposed a
15 sentence within the range it thought was
16 appropriate. And so we know from that or can
17 infer that the district court concluded that
18 the Petitioner was, in fact, a fairly typical
19 defendant with this criminal history and
20 offense conduct.

21 JUSTICE BREYER: Wait, wait, wait.
22 Just a second. Just in case you know this, I
23 mean, I should know it, but -- I wrote it.

24 MR. ELLIS: I probably should too.

25 JUSTICE BREYER: But I don't

1 necessarily. Did we declare this -- this
2 section unconstitutional in Booker? I mean, we
3 tried to save as much as we could, and I don't
4 know why we wouldn't have saved this one.

5 MR. ELLIS: No, the Court didn't.
6 There was a -- there was a dispute about
7 whether (f) would go down with (e).

8 JUSTICE BREYER: Yeah.

9 MR. ELLIS: It was subsequently --
10 Justice Scalia subsequently wrote about it in
11 concurrence in Rita, and then the Court wrote
12 about it in Footnote 7 of the majority opinion
13 in Greenlaw.

14 JUSTICE BREYER: My goodness, that's
15 very good. That's very good. And so what --
16 and so we kept it or we didn't?

17 MR. ELLIS: It's an open question, I
18 think.

19 JUSTICE BREYER: It's an open
20 question, okay. Thank you.

21 (Laughter.)

22 MR. ELLIS: We don't think it needs to
23 be resolved in this case because we do think
24 it's talking about preserved errors and the
25 plain error rule would apply.

1 Number 3 -- the number 3 reason is the
2 district court imposed not just a sentence
3 pegged to the bottom or top of what it thought
4 was the correct range but somewhere in the
5 middle, albeit in the bottom half.

6 JUSTICE KAGAN: Well, pretty -- pretty
7 low, you know, just over the bottom. But I
8 think it -- it seems to me all these, 1, 2, and
9 3, run smack into Molina-Martinez, which, you
10 know, basically rejected all of these arguments
11 and said it doesn't matter if your sentence
12 ends up in the middle because the -- the range
13 does something. It anchors people's sentencing
14 determinations, and it anchors them
15 sufficiently so that even if you could have
16 reached that sentence regardless of the range
17 being wrong, we think the error in the range
18 matters and is likely to matter in the great
19 majority of cases.

20 And you're suggesting that we ignore
21 everything we said about that now.

22 MR. ELLIS: Not at all, Your Honor. I
23 think the Court was dealing very clearly with
24 that third prong in Molina-Martinez. And the
25 question under that third prong, as we see it,

1 is whether that creates, as the Court said, a
2 reasonable probability of a different outcome.
3 That's a predictive judgment that can be based
4 on empirics, and the Court reasonably did so in
5 Molina-Martinez. And it doesn't matter for
6 that as to whether the change was a day or 10
7 years. It just doesn't. The question is
8 whether there's a reasonable probability of a
9 different outcome. And there is.

10 The question under the fourth prong is
11 whether that's the sort of error that's so
12 egregious we won't submit it to the ordinary
13 rules of party presentation and forfeiture.
14 And that's a broader inquiry, we think, and one
15 in which it matters that it's a day or 10 years
16 and one in which it matters that this is the
17 sort of error that the defendant had every
18 opportunity to raise and, in fact, was uniquely
19 competent to raise.

20 And it matters that the district
21 court, even if we can't say definitely would
22 have, although there's some indication that it
23 might -- that he could have, and that sentence
24 would have been reviewed very deferentially on
25 appeal, and it would have been a reasonable

1 one.

2 JUSTICE SOTOMAYOR: I'm sorry --

3 MR. ELLIS: All those things weigh in,
4 we think.

5 JUSTICE SOTOMAYOR: -- when -- when
6 you're talking about reasonableness, it seems
7 like you're doing substantive reasonableness,
8 which is what the Fifth Circuit was doing with
9 its standard. It borrowed a substantive due
10 process right or standard, shock the
11 conscience, and applied it to this sentence.

12 And it sounds like, with all your
13 three reasons and your argument, which is the
14 only thing that matters is that it doesn't --
15 that this is a reasonable sentence no matter if
16 it's not the sentence the district court would
17 have given. That's basically your argument,
18 isn't it?

19 MR. ELLIS: We think that matters.

20 JUSTICE SOTOMAYOR: All right. But
21 why? When the three prongs of the fourth, the
22 three arms of the fourth prong say fairness,
23 integrity, or -- I've forgotten the fourth, but
24 it's in --

25 MR. ELLIS: Public reputation.

1 JUSTICE SOTOMAYOR: Public reputation.

2 "Or" is disjunctive, not conjunctive.

3 MR. ELLIS: That's right.

4 JUSTICE SOTOMAYOR: So why isn't it
5 unfair?

6 MR. ELLIS: We think it's not unfair
7 because --

8 JUSTICE SOTOMAYOR: But that's a
9 procedural right. That's not a substantive
10 right.

11 MR. ELLIS: So a couple responses to
12 that, Your Honor.

13 We think it's not unfair because the
14 contemporaneous objection rule is the ordinary
15 rule, and we think in the ordinary case, that
16 applying that rule and the consequences of that
17 rule is fair.

18 We think it's -- it's reasonable to
19 look at the substantive result --

20 JUSTICE SOTOMAYOR: That's not what
21 this fourth prong says. What this fourth prong
22 appears to say is the fairness, integrity, or
23 public reputation of our judicial system.
24 What's fair about an error that the judge, in
25 part, was a part of that could be easily

1 corrected and that might very well result in a
2 lower sentence to a defendant? What's fair
3 about not correcting that error?

4 MR. ELLIS: I think what's fair is
5 that -- I think it -- a system has to have
6 rules and those rules have to have
7 consequences. And I think that -- that people
8 would understand that, and in the ordinary
9 case, that it does -- just the fact that the
10 defendant didn't raise this error in a timely
11 manner is sufficient reason to say that we're
12 not going to correct it on appeal.

13 You noted the cost, and that's come up
14 several times in this colloquy, in our -- in
15 our discussion, and I think that the cost may
16 be a reason to change the standard, but we
17 don't think it's -- it's a reason to -- that
18 the Court should -- should consider in applying
19 the standard.

20 We don't think, for example, that two
21 otherwise identical trial errors should be
22 subjected to a different standard because one
23 came from a two-day trial and the other a
24 two-month trial and, therefore, would be more
25 expensive to correct.

1 JUSTICE KAGAN: Well, but there again
2 Molina-Martinez is against you, right, because,
3 in that case, we talked about the fact that a
4 remand for resentencing -- I'm quoting now --
5 "while not costless, does not involve the same
6 difficulties as a remand for retrial."

7 And we talked about the government had
8 this concern over judicial resources, and we
9 specifically rejected that. And we said, you
10 know, that the resources are not sufficient for
11 us to take that seriously here.

12 MR. ELLIS: So what the Court said is
13 that it's not the same as a retrial, but what
14 the Court also said is that it doesn't really
15 matter because it's not relevant to the
16 standard under the third prong, and we agree
17 it's the same under the fourth prong, that the
18 costs of resentencing aren't relevant to the
19 application of whether the error itself is one
20 that significantly affects the fairness,
21 integrity, and public reputation of judicial
22 proceedings.

23 JUSTICE GORSUCH: If we're going to
24 compare the -- the cost empirically of the two
25 systems, wouldn't we have to account for the

1 fact that under the regime you propose there
2 are a lot more appeals that the courts of
3 appeals have to resolve?

4 In the circuits where this rule exists
5 or this presumption exists, the government
6 frequently confesses error to mathematical
7 mistakes in the guidelines applications and it
8 automatically goes back for resentencing
9 without the need of -- of appellate resources
10 being involved.

11 Should that be a cost that we should
12 consider or -- or is that one you would have us
13 ignore?

14 MR. ELLIS: So, to be clear, it's my
15 position that cost is not relevant to applying
16 the standard. It might be --

17 JUSTICE GORSUCH: You mean the fourth
18 prong as well, it's irrelevant there too?

19 MR. ELLIS: Yes. And I also think
20 that it's not clear empirically that that would
21 be true.

22 I think the -- the point of the plain
23 error rule and the narrowness, the reason it's
24 strictly circumscribed, is to maintain the
25 incentives in the first instance to raise those

1 errors, so you never get to the point where
2 someone's filing an appeal about an error they
3 didn't raise.

4 JUSTICE GORSUCH: That's -- that's
5 just an argument against the plain error rule
6 all together, isn't it?

7 MR. ELLIS: No, I don't think it is.
8 It's an error for -- for keeping the plain
9 error rule to be a narrow one, to be strictly
10 circumscribed, to maintain the balance between
11 Rule 51 and Rule 52 and maintain the
12 incentives. That's what the Court has always
13 said about what it's concerned about in
14 applying the plain error rule.

15 JUSTICE KENNEDY: Are there --

16 JUSTICE ALITO: If the plain error --

17 JUSTICE KENNEDY: -- are there some
18 courts -- and I -- I don't mean to be facetious
19 because I think I remember, are there some
20 courts of appeals that just write the district
21 judge a letter and say would it make a
22 difference?

23 MR. ELLIS: So there is this limited
24 remand procedure that the Court identified --

25 JUSTICE KENNEDY: Limited remand?

1 MR. ELLIS: Yes. So the Court
2 identified that in Molina-Martinez as a way to
3 mitigate the costs. It's really about the
4 third prong because the third prong is, is
5 there a reasonable probability of a different
6 sentence?

7 And so you can answer that. Ask the
8 judge. But if the judge says yes, there's
9 still the fourth prong and there's still the
10 full resentencing that follows.

11 Post-Molina-Martinez, we haven't found
12 any examples of courts utilizing that for a
13 guidelines range error. In fact, the Seventh
14 Circuit has said that's not about guideline
15 range errors. That's about the Booker errors
16 and whether they treated the guidelines
17 advisory or mandatory.

18 If there are no further questions,
19 we'd ask the Court to affirm the judgment
20 below.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Davidson, seven minutes.

24

25

1 REBUTTAL ARGUMENT OF KRISTIN L. DAVIDSON
2 ON BEHALF OF THE PETITIONER

3 MS. DAVIDSON: I'd like to start with
4 what Justice Breyer said about the guidelines
5 as being a specialized body of guidance that
6 has specialized proceedings.

7 And we can't ignore the context and
8 the essential framework of the guidelines and
9 the Court's decisions regarding how those
10 guidelines function just because we're under
11 the fourth prong.

12 And so we disagree that the -- that
13 the factors that the government considers are
14 even appropriate because they're directly at
15 odds with the clear guidance the Court has
16 provided.

17 I also want to address the discussion
18 about 3742. I agree that whether or not it's
19 still viable doesn't have to be decided today,
20 but I do think it provides clear congressional
21 judgment that at the point of which substantive
22 rights are affected, it -- it's at least
23 Congress's intention that the error is serious
24 enough that it warrants remand.

25 In conclusion, prongs 1, 2, and 3 have

1 been met. The Fifth Circuit applied the wrong
2 legal standard under the fourth prong. The
3 government presents factors that are
4 appropriate for a district court to consider.

5 And that's why we ask this Court to
6 reverse the judgment and remand, with
7 instructions that the sentence be vacated and
8 that the case be remanded to the district court
9 for resentencing.

10 JUSTICE ALITO: Would you draw a
11 distinction between guidelines errors and other
12 sentencing errors?

13 MS. DAVIDSON: Yes.

14 JUSTICE ALITO: And what would be the
15 ground for that?

16 MS. DAVIDSON: It would depend on the
17 direct effect the particular sentencing error
18 would have on the outcome and whether or not
19 the error frustrated the purposes served by the
20 rule in question. And that could be different
21 than how the guidelines function.

22 JUSTICE ALITO: Suppose there was a
23 question about whether a defendant was properly
24 treated as a recidivist.

25 MS. DAVIDSON: That would -- if I

1 understand the question correctly, it would be
2 a district court's evaluation of the conduct as
3 -- as opposed to the guideline. If it's purely
4 conduct --

5 JUSTICE ALITO: No, I'm talking about
6 a non-guidelines issue, a statutory issue where
7 there's a heavier sentence imposed based on
8 prior criminal conduct.

9 MS. DAVIDSON: If it were erroneous
10 and that's what the -- if it were erroneous and
11 the district -- and the record demonstrated
12 that the district court was influenced in -- in
13 choosing its sentence because of that error,
14 then I think that it would reflect an error
15 that improperly influences the discretion of
16 the district court and could be serious enough
17 to meet all four prongs.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:11 a.m., the case
22 was submitted.)

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24

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